Supreme Court, U.S.
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No. 91-967

In the Supreme Court of the United States

OCTOBER TERM, 1991

GERALD TEICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars this prosecution for willful evasion of the federal excise tax on gasoline and conspiracy to defraud the United States, because petitioner previously pleaded guilty in state court to violations of state law arising from the same activities that were the subjects of the joint federal and state investigation that led to this prosecution.

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Constitution:

U.S. Const. Amend. V:	
Double Jeopardy Clause	4, 5, 10
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported. The memorandum and order of the district court (Pet. App. 6a-14a) is reported at 766 F. Supp. 87.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1991. A petition for rehearing with suggestion for rehearing en banc was denied on December 2, 1991. Pet. App. 4a-5a. The petition for a writ of certiorari was filed on December 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On January 30, 1991, petitioner and four other individuals were charged in a federal indictment in the Eastern District of New York with one count of conspiracy to defraud the United States, and four counts of attempted evasion of approximately $14 million in federal gasoline excise taxes. C.A. App. 17-31.

The five individuals charged in the indictment owned or worked for various businesses that purchased and sold gasoline between January 1, 1984, and March 8, 1986. C.A. App. 17-18, 20, 24. During that period, federal law required a producer of gasoline to pay the United States a federal excise tax of nine cents on each gallon of gasoline sold. *Id.* at 18. The Internal Revenue Code defined "producer" to include, among others, certain wholesale distributors of gasoline, as well as producers of gasoline. *Ibid.* A producer, including a wholesale distributor, that held a Registration for Tax Free Transactions (IRS Form 637) could buy gasoline tax free, and make tax-free sales to another holder of a Form 637. *Id.* at 18-19. The first producer to sell gasoline to a buyer who did not hold an IRS Form 637 was required to pay the excise tax. *Id.* at 19.

Petitioner worked in the offices of No Brand Gasoline, Inc., a company that did not hold a Form 637. C.A. App. 18, 19. Lewis Petrochemical & Trading Corp., which did hold a Form 637, sold gasoline to No Brand, and was required to pay excise tax on those sales. *Id.* at 19-21. Ordinarily, Lewis Petrochemical would have included the tax in the price it charged No Brand for the gasoline. *Ibid.*

According to the indictment, however, petitioner and his co-defendants perpetrated a complicated scheme that created the illusion that gasoline sales from Lewis Petrochemical to No Brand were in fact made to so-called "burn companies" that held Form 637. The indictment charges that the burn companies in turn made tax-included "sales" to No Brand, and thus

incurred liability for the federal excise taxes. Because the burn companies were short-lived entities with little or no assets, however, the Internal Revenue Service was unable to collect the taxes from them. C.A. App. 19-23.[1]

The proceeds of the conspiracy were divided among the indicted parties and others, often in the form of cash or gasoline or both. C.A. App. 23. Those proceeds were considerable. The indictment charges that the petitioner and his co-defendants failed to pay more than $14 million in federal excise taxes that were lawfully due. *Id.* at 27-31.[2]

2. The indictment in this case was a result of a joint investigation by the United States and the State of New York. C.A. App. 69. During the investigation, Suffolk County Assistant District Attorney Raymond Jermyn was "cross-designated" for purposes of the investigation as a Special Assistant United States Attorney. Jermyn's cross-designation terminated on March 31, 1989—almost two years before the indictment against petitioner in this case was brought—and he had no involvement in drafting or bringing that indictment. *Id.* at 119-120. In 1986, as a result of the investigation, a New York State grand jury returned a 1,004-count indictment against petitioner and others. *Id.* at 33-35. The state indictment charged the defendants with stealing and conspiring to steal approximately $16,700,000 in state excise tax revenues

[1] The indictment alleges that the defendants and others conspired to conceal the existence of their scheme and to prevent the disclosure of their activities. The burn companies were each used for only a short period of time in order to minimize the chance that the scheme would be discovered, and records were destroyed in order to conceal the conspirators' activities. C.A. App. 23.

[2] The indictment also charges petitioner and his co-defendants with failing to file federal excise tax returns, falsifying books and records, concealing assets and sources of income, and making false statements to the IRS and a federal grand jury. C.A. App. 27-31.

and approximately $19,200,000 in state sales tax revenues. *Id.* at 41. In 1987, petitioner pleaded guilty to 1,003 counts of the state indictment. *Id.* at 61-65.

3. Following the return of the indictment in this case, petitioner and his co-defendants filed a motion to dismiss, contending that the federal prosecution violated the Double Jeopardy Clause. The district court denied that motion by Memorandum and Order dated June 24, 1991. Pet. App. 6a-14a. The court held that under the dual sovereignty doctrine—which permits a federal prosecution after a state proceeding arising out of the same conduct—the Double Jeopardy Clause does not bar this federal prosecution. The court rejected the defendants' contention that, because of cooperation and coordination between the state and federal authorities, this case fell within an exception to the dual sovereignty rule, under which a successive prosecution will be barred if it is demonstrated that one prosecuting sovereign is merely acting as a "tool" of the other or that one proceeding is essentially a sham and a cover for the other.

4. Following an interlocutory appeal, the court of appeals affirmed the district court's order. Pet. App. 1a-3a. Citing *Abbate* v. *United States*, 359 U.S. 187 (1959), the court noted that the Double Jeopardy Clause does not preclude successive state and federal prosecutions for the same acts. The court also rejected petitioner's contention that the prosecution in this case fell within an exception to the dual sovereignty principle. In particular, the court concurred in the findings of the trial court that neither sovereign was "acting as a 'tool' of the other," and that neither prosecution was merely a "sham and a cover" for the other. Pet. App. 2a.[3]

[3] On December 23, 1991, petitioner entered a conditional guilty plea on the conspiracy charge (Count 1) and on two counts of attempted tax evasion (Counts 4 and 5). The plea is conditioned on the disposition of this petition.

ARGUMENT

Petitioner contends (Pet. 13-26) that the decision of the court of appeals is inconsistent with *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), and that the courts of appeals have divergent views regarding the existence and scope of the "sham" exception to the dual sovereignty doctrine.

1. The court of appeals properly applied the dual sovereignty doctrine. Under that doctrine, the Double Jeopardy Clause does not prohibit one sovereign, such as the federal government, from prosecuting a defendant for particular conduct, even if that conduct has previously been the subject of prosecution by another sovereign, such as a State. *Abbate* v. *United States*, 359 U.S. 187, 194 (1959); *Bartkus* v. *Illinois*, 359 U.S. at 132; *United States* v. *Lanza*, 260 U.S. 377 (1922).

In *Bartkus*, the Court suggested that the dual sovereignty doctrine might not apply, and that a subsequent prosecution might be barred, if one prosecuting sovereign was acting as a "tool" of the other, or if one prosecution was merely a "sham and a cover" for another. *Bartkus*, 359 U.S. at 123-124. Finding that not to be the case on the facts before it, the *Bartkus* Court rejected the contention that the subsequent state prosecution of the defendant following his acquittal in a federal trial violated due process.

Petitioner contends (Pet. 15-26) that this case falls within the "sham" exception to the dual sovereignty doctrine suggested by this Court in *Bartkus*. Citing the cooperative efforts of state and federal authorities in the joint investigation and the cross-designation of state prosecutor Jermyn as a Special Assistant United States Attorney, petitioner asserts that the federal and state authorities were so "inextricably intertwined" (Pet. 9) in the investigation conducted by the joint task force that any prosecutions resulting from that investigation must be regarded as the work of a single sovereign. Focusing in particular on Jermyn's

participation in both the federal and state cases, petitioner asserts that the federal government was the "unique and ultimate source of power" behind the task force investigation. Pet. 21 n.8.

These contentions are without merit. As both the district court and the court of appeals concluded, there is nothing to suggest that either sovereign in this case was acting as a tool of the other, or that either prosecution was a sham and a cover for the other. Both the state and federal governments had distinct interests in prosecuting petitioner for his crimes—specifically, each sovereign was defrauded of millions of dollars in tax revenue. Under the facts here—where the damage to each sovereign's interests is readily identified and distinguished—it is clear that neither prosecution could vindicate the interests of the non-prosecuting sovereign. There is therefore nothing improper in the federal government's effort to punish petitioner for his federal crimes after the state government had completed its prosecution for state offenses. See *Heath* v. *Alabama*, 474 U.S. 82, 93 (1985) ("Federal Government has the right to decide that a state prosecution has not vindicated a violation of the 'peace and dignity' of the Federal Government."); *United States* v. *Davis*, 906 F.2d 829, 832 (2d Cir. 1990) ("nothing prevents a federal prosecution whenever the state proceeding has not adequately protected the federal interest"). The federal government's interests in imposing and collecting federal excise taxes on motor fuel transactions and in prosecuting violations of its tax laws could not possibly have been protected in the prior state prosecution of defendants for state tax violations. See *Heath* v. *Alabama*, 474 U.S. at 93. Thus, the federal government's interests were not represented in the state proceeding, and the federal government was entitled to

bring the instant prosecution in order to punish the violation of its own laws.[4]

Petitioner points to nothing suggesting that either sovereign involved in the joint investigation was attempting to vindicate the other's interests. The cross-designation of prosecutor Jermyn merely served to facilitate his participation and assistance in the joint investigation. There is no evidence that Jermyn, in his capacity as a state prosecutor, was controlled or influenced by federal authorities, or that he was acting to protect federal interests.[5] Moreover, Jermyn's designation as an attorney authorized to represent the United States terminated on March 31, 1989, and he was not involved in either drafting or reviewing the federal indictment in this case. C.A. App. 119-120.

2. Petitioner fails to identify a conflict between the decision in this case and that of any other court of appeals. Although petitioner contends (Pet. 14-15) that the Fifth and Seventh Circuits have questioned the existence of the *Bartkus* exception, and that the Tenth

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[4] The same is true with respect to the interests of the State of New York. There can be no suggestion that the State was not seeking to vindicate its own interests in prosecuting the theft of nearly $36 million in state excise and sales taxes.

[5] Petitioner points (Pet. 10-11, 23) to the fact that Jermyn signed a plea agreement (C.A. App. 82-85) between certain governmental entities and George Kryssing, a gasoline supplier implicated in a gasoline bootlegging scheme uncovered by the joint investigation. In the agreement, which was signed both by Jermyn and by a Department of Justice trial attorney (*id.* at 85), the term "the government" is used as an abbreviation for those agencies that agreed to be bound—the U.S. Department of Justice, Fraud Section, the Organized Crime Strike Force for the Eastern District of New York, the State of New York, and Suffolk County, New York. *Id.* at 82. While the agreement manifests cooperation among these entities, it does not indicate that they were functioning as a single government rather than as separate governmental entities independently looking after their own interests. It also does not suggest that the federal government was the ultimate source of power behind the state prosecution.

Circuit has recently characterized it as only a "possible" exception, he points to no case holding that the exception does not exist.[6] Moreover, even if the courts of appeals were in conflict on that issue, such a conflict would not require resolution in this case. The court of appeals assumed that the *Bartkus* exception exists, and correctly concluded on the facts of this case that the exception would not apply, because neither prosecution was a sham or a cover for the other.[7]

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[6] The cases that petitioner characterizes as questioning whether the exception exists merely recognized that this Court has never held it to be applicable in any case, and that *Bartkus* itself refused to invoke the exception on the facts presented there. See *United States* v. *Patterson*, 809 F.2d 244, 247 n.2 (5th Cir. 1987); *United States* v. *Paiz*, 905 F.2d 1014, 1024 n.13 (7th Cir. 1990), cert. denied, 111 S. Ct. 1319 (1991). The Tenth Circuit, in *United States* v. *Raymer*, 941 F.2d 1031 (1991), recognized that the *Bartkus* exception might bar a successive prosecution, and analyzed whether the degree of federal involvement in the prior state prosecution was so great that both prosecutions were effectively the act of one sovereign. No case cited by petitioner rejects the applicability of the *Bartkus* exception in appropriate factual circumstances.

[7] A district court case, *United States* v. *Belcher*, 762 F. Supp. 666 (W.D. Va. 1991), is the only instance cited by petitioner (Pet. 23-24) in which an exception to the dual sovereignty rule has been applied based on state/federal cooperation. In that case, as a result of destruction of evidence, a state prosecutor was unable to obtain convictions on drug offenses in a state prosecution. Thereafter, the same prosecutor, who was designated a Special Assistant United States Attorney, drafted an indictment against the same defendants for the same acts, and requested the United States Attorney to bring the charges in federal court. The court found that the prosecutor, in effect, moved the case to federal court in an effort to avoid the state evidentiary ruling concerning the destruction of evidence. As a result, the court viewed both sovereigns as in privity for collateral estoppel purposes, and held that the federal government could not relitigate the issues that the same prosecutor had lost in state court.

Unlike *Belcher*, this was not a case in which the state prosecutor sought to circumvent an unfavorable evidentiary ruling by seeking

Petitioner argues (Pet. 24-25) that the Ninth and Tenth Circuits are in conflict as to whether the cross-designation of state prosecutors as federal prosecutors implicates the *Bartkus* exception. In *United States* v. *Bernhardt*, 831 F.2d 181, 182-183 (1987), the Ninth Circuit expressed concern that a state prosecutor received a cross-designation as a federal prosecutor, and brought a federal prosecution arising out of the same facts as a prior state case that he had prosecuted. The Ninth Circuit nonetheless concluded that the cross-designation, even in combination with state funding of both cases, did not trigger the "sham" exception as long as there was sufficient independent federal involvement in the federal prosecution. *Id.* at 183.

The Tenth Circuit, in *United States* v. *Raymer*, 941 F.2d 1031, 1039 (1991), questioned whether involvement of the same witnesses and the same prosecutor in successive state and federal prosecutions could ever be enough, standing alone, to establish that the federal prosecution was a sham. The court nonetheless evaluated the degree of independent federal involvement in the case and concluded that the "sham" exception was inapplicable because the "federal prosecution was [not] merely a tool of the State." *Ibid.* Thus, although the Tenth Circuit has expressed skepticism about whether the "sham" exception might be triggered by the cross-designation of a state or federal prosecutor, there is no conflict in the holdings of the Ninth and Tenth Circuits on the issue presented in this case.[8]

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the federal indictment. Moreover, Jermyn, unlike the state prosecutor in *Belcher*, was not involved in the institution of the federal prosecution here. Finally, as the district court found (Pet. App. 12a), given the favorable resolution of the state case, the State of New York had no motive for attempting to manipulate or influence this federal prosecution.

[8] Petitioner also contends (Pet. 14) that the decision in this case has created "an intolerable intra-Circuit conflict" with *United*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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States v. *Davis*, 906 F.2d 829 (2d Cir. 1990). Even if such an intra-circuit conflict existed, it would not be for this Court to resolve. In any event, the conflict posited by petitioner does not exist. Contrary to petitioner's assertion, the Second Circuit did not hold in *Davis* that the analysis under *Bartkus* should focus primarily on the extent to which federal prosecutors had actively participated in a prior state prosecution. Rather, the *Davis* court recognized that the question under *Bartkus* is whether "one prosecuting sovereign can be said to be acting as a 'tool' of the other" or whether "one prosecution is merely 'a sham and a cover' for another." 906 F.2d at 832, 834. The analysis in *Davis* to which petitioner refers concerned whether the Due Process Clause, as distinct from the Double Jeopardy Clause, required application of collateral estoppel in that federal prosecution. *Id.* at 832-835.